Taman Sungai Dua Development Sdn Bhd (previously known as Supershine (M) Sdn Bhd) v Goh Boon Kim

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-453-95
MAHADEV SHANKAR, ABU MANSOR JJCA AND ABDUL MALEK AHMAD J
9 OCTOBER 1995

Companies and Corporations *— Winding up — Liquidators — Application to stay order appointing provisional liquidator — Whether company ceased to have any capacity to instruct solicitors to make application once the provisional liquidators were appointed — Whether the powers and duties of a provisional liquidator could be stayed pending appeal — Companies Act 1965 s 226(3)*

The respondent company ('the company') had its registered office and sole asset ('Lot 202') in Penang. At an extraordinary general meeting on 8 October 1994, the company decided to increase its authorized capital from RM25,000 to RM1.5m and also for another RM900,000 by way of redeemable convertible unsecured loan stock to raise the required finance to get the company operational. The petitioner, a director of the company, together with two others, filed a winding-up petition against the company and prayed that the company be restrained from increasing its capital, that a provisional liquidator be appointed to take custody of its assets, evaluate and sell Lot 202 and use the proceeds to pay up the loan of the company, and that eventually the company be wound up. The trial judge made an order granting the petitioner all the relief claimed for, short of the company being wound up. Subsequently, the company applied for an order that the powers and duties of the provisional liquidators be stayed until final disposal of its appeal on the ground was that the appeal would be nugatory if the provisional liquidator was allowed to sell off the only asset which justified the company's existence as a housing developer. The petitioner's counsel raised a preliminary objection that the company ceased to have any capacity to instruct solicitors to make this application once the provisional liquidators were appointed following s 226(3) of the Companies Act 1965 ('the Act').

Held, granting the application for stay of execution pending appeal:

(1) Section 226(3) of the Act only applies to proceedings against the company. The crucial distinction in this case was that the company was making the application to appeal against the order appointing the provisional liquidators. Therefore, s 226(3) of the Act was not applicable in this case (see pp 531D–I and 532A–C); *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1991] 3 MLJ 325 followed and *Yamamori (Hong Kong) Ltd v Borneo Hotel Sdn Bhd & Anor* [1991] 3 CLJ 2238 distinguished.

(2) In this case, the winding-up order had not yet been made. Authorities cited to the court showed that notwithstanding the

A appointment of a provisional liquidator, the directors retain the power to have the company represented in winding-up proceedings. Further, it is common ground that notwithstanding the appointment of a provisional liquidator, the board still has residuary powers, for example, it can instruct solicitors and counsel to oppose the current petition and, if a winding-up order is made, to appeal against that order. Therefore, the preliminary objection was devoid of merit (see p 533C–D, F–G).

[Bahasa Malaysia summary

Syarikat penentang ('syarikat tersebut') mempunyai pejabat berdaftar dan aset tunggal ('Lot 202') di Pulau Pinang. Di suatu mesyuarat luar biasa pada 8 Oktober 1994, syarikat tersebut membuat keputusan untuk menambahkan modal dibenarkan daripada RM25,000 kepada RM1.5 juta dan juga untuk tambahan sebanyak RM900,000 menerusi stok pinjaman tidak bercagar yang boleh tebus dan ditukarkan untuk mendapatkan kewangan yang perlu bagi membolehkan syarikat tersebut mula beroperasi. Pempetisyen, seorang pengarah syarikat tersebut, bersama dengan dua orang lain, telah memfailkan satu petisyen penggulungan terhadap syarikat tersebut dan memohon supaya syarikat tersebut dihalang daripada menambahkan modalnya, bahawa seorang penyelesai sementara dilantik untuk menahan aset-asetnya, menilai dan menjual Lot 202 dan menggunakan hasil untuk membayar pinjaman syarikat tersebut, dan bahawa syarikat tersebut pada akhirnya digulung. Hakim perbicaraan membuat satu perintah memberikan pempetisyen semua relief yang dituntut, kecuali penggulungan syarikat tersebut. Ekoran itu, syarikat tersebut memohon perintah bahawa kuasa dan tugas penyelesai sementara digantung sehingga penyelesaian muktamad rayuan atas alasan bahawa rayuan akan menjadi tidak berguna jika penyelesai sementara dibenarkan menjual aset tunggal yang memberi justifikasi kepada kewujudan syarikat tersebut sebagai pemaju perumahan. Peguam pempetisyen membangkitkan bantahan permulaan bahawa syarikat tersebut tidak lagi berkeupayaan mengarah peguamcara untuk membuat permohonan ini sebaik sahaja penyelesai sementara dilantik menurut s 226(3) Akta Syarikat 1965 ('Akta tersebut').

Diputuskan, membenarkan permohonan untuk penggantungan sementara menunggu rayuan:

(1) Seksyen 226(3) Akta tersebut hanya terpakai kepada prosiding terhadap syarikat tersebut. Perbezaan yang penting dalam kes ini adalah bahawa syarikat tersebut membuat permohonan untuk merayu terhadap perintah yang melantik penyelesai sementara. Oleh itu, s 226(3) Akta tersebut tidak terpakai dalam kes ini (lihat ms 531D–I dan 532A–C); *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1991] 3 MLJ 325 diikut dan *Yamamori (Hong Kong) Ltd v Borneo Hotel Sdn Bhd & Anor* [1991] 3 CLJ 2238 dibeza.

(2) Dalam kes ini, perintah penggulungan belum lagi dibuat. Autoriti-autoriti yang disebut kepada mahkamah menunjukkan bahawa tanpa mengira pelantikan penyelesai sementara, pengarah mengekalkan kuasa untuk membolehkan syarikat diwakili dalam prosiding penggulungan. Selanjutnya, adalah pengetahuan umum bahawa tanpa mengira pelantikan penyelesai sementara, lembaga masih mempunyai kuasa baki; misalnya, ia boleh mengarah peguamcara dan peguam untuk membantah petisyen ini dan, jika satu perintah penggulungan dibuat, untuk merayu terhadap perintah itu. Oleh yang demikian, bantahan permulaan tidak mempunyai merit (lihat ms 533C–D, F–G).]

Notes

For cases on winding up, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 399–570.

Cases referred to

Sri Hartamas Development Sdn Bhd v MBF Finance Bhd [1991] 3 MLJ 325 (folld)

Yamamori (Hong Kong) Ltd v Borneo Hotel Sdn Bhd & Anor [1991] 3 CLJ 2238 (distd)

Legislation referred to

Companies Act 1965 ss 226(3), 231

Appeal from: Company Winding-Up No S5–22–490–94 (High Court, Kuala Lumpur)

Gan Teik Chee (*Gan Teik Chee & Ho*) for the appellant/the company.
Liow Si Khoon (*Liow & Co*) for the respondent/petitioner.

Mahadev Shankar JCA: On 8 June 1995, Mokhtar Sidin J (as he then was), in the exercise of his original jurisdiction, appointed provisional liquidators of the respondent company ('the company') under s 231 of the Companies Act 1965 ('the Act'). The company applied to this court for an order that the powers and duties of the provisional liquidators be stayed until final disposal of its appeal. We granted the application. Our reasons now follow.

The company has its registered office in Penang. It was incorporated in 1989 with an authorized and paid-up capital of RM25,000. A total of 12,750 shares are held by Goh Boon Kim ('the petitioner'), Goh Siew Geok and Quah Cheow Khoon, while 14,500 shares are held by Pulau Bintang Holdings Sdn Bhd ('PB'), Pulau Bintang Credit Sdn Bhd and Chan Guan Hwa. Initially, the directors of the company were:

(i) Lim Chee Sin @ Lim Ah Ba;

(ii) Chan Guan Hwa;

A (iii) Lim Lai Huat;

(iv) Goh Boon Kim; and

(v) Goh Siew Geok.

The primary object of the company was to build and sell houses. Shortly after incorporation, the company borrowed RM360,000 from PB and RM240,000 from Goh. With the RM600,000, the company bought Lot 202, Mukim 13 NED, Taman Sungai Dua, Penang ('Lot 202').

According to the petitioner, Lim Chee Sin was a director and shareholder in:

C (i) Pulau Bintang Holdings Sdn Bhd;

(ii) Pulau Bintang Credit Sdn Bhd;

(iii) Upchem Resources Sdn Bhd; and

(iv) Upchem Development Sdn Bhd ('Upchem').

D Upchem owned a piece of land ('Lot 1705') about 5km away from Lot 202. Between 1990 and 1994, Upchem had almost completed the development of Lot 1705 by putting up flats thereon.

Lot 202 in the meantime had remained stagnant except for the dilution of its liquid assets by way of a monthly payment of RM500 from the company to Upchem for management fees. By early 1993, the Board E had divided into two factions with Lim Chee Sin, Chan Guan Hwa and Lim Lai Huat in one camp, and the petitioner Goh Boon Kim, Goh Siew Geok and Quah Cheow Khoon on the other.

Their differences arose, inter alia, out of:

F (i) a demand by PB in February 1993 that the loan of RM360,000 plus interest be repaid;

(ii) an EGM convened for 6 April 1993 to pass a resolution to raise funds to repay the loan of RM600,000 taken to buy Lot 202; and

(iii) the drain of RM500 per month from the company to Upchem with G no apparent benefit.

Alleging that the affairs of the company were being conducted in a manner oppressive to them, Goh Siew Geok and Quah Cheow Khoon filed Winding-Up Petition No 28–2–93 in the Penang High Court. By reason of their alliance, we may infer that this petition was also filed for the H benefit of Goh Boon Kim. Goh Siew Geok and Quah Cheow Khoon managed to get an ex parte injunction on 5 April 1993 to prevent the EGM from proceeding on 6 April 1993. However, the injunction was subsequently set aside and the petition was struck out.

Thereafter, on 22 July 1994, Lim Chee Sin's remuneration as director of the company was raised to RM5,000 per month. Then, at a meeting of I the company held on 19 August 1994, Goh Siew Geok was removed as a director. On 12 September 1994, the board removed the petitioner as a signatory to the company's cheques. Notice was then given of an EGM to be held on 8 October 1994 to increase the authorized capital from

RM25,000 to RM1.5m and also for another RM900,000 by way of redeemable convertible unsecured loan stock. A

This move which PB and Lim Chee Sin may have viewed as a necessity to raise the required finance to get the company going, was viewed by Goh as evidence of an ultimate act of oppression calculated to exclude his group from the company. Goh therefore filed this petition on 26 September 1994, not in Penang where the company has its registered office and its only asset, ie Lot 202, but in the Kuala Lumpur High Court! B

Mr Gan Teik Chee of counsel has informed us from the Bar table that the company immediately applied for the petition to be transferred to the Penang High Court. The learned judge refused. No doubt his reasons for doing so will be ventilated in the appeal which is pending. C

The prayers in the petition are that the company be restrained from increasing its capital, and that a provisional liquidator be appointed pursuant to s 231 of the Act, to take custody of its assets, arrange for a valuation of Lot 202, have it sold by public auction, use the proceeds to pay off the expenses and fees incurred, the loan of RM600,000 taken by the company and thereafter have the company wound up. D

The subsequent cause papers filed in this petition are not before us, but from the order of the trial judge made on 8 June 1995, it is evident that on the basis of the affidavits filed for and against the petition, the trial judge on a summons in chambers dated 23 March 1995 made an order granting the petitioner all the relief claimed for, short of ordering that the company be wound up. E

On its face, this was an interlocutory order made before a proper trial of the issues. In actual fact, it was a final order because it would have resulted in the sale of Lot 202 and thus the disappearance of the substratum of the company. Since the provisional liquidators were required to apply to the court to have the company wound up only after they had sold and distributed the assets of the company, there would have been nothing left to wind up except a formal order to sanction a *fait accompli.* F

Immediately after the order was made, the company applied for a stay of execution pending appeal. It was refused. A notice of appeal was then filed and a formal application was made to the trial judge for a stay. It was again refused on 12 July 1995. Then, the company applied to us for a stay. The main ground was that the appeal would be nugatory if the provisional liquidators were allowed to sell off the only asset which justified the company's existence as a housing developer. G H

Since we did not have the judgment of the learned trial judge before us, we do not know why he did not transfer this petition to Penang when he was asked to or why, on an interlocutory application, he granted the petitioner all the relief he claimed on contested affidavits without a trial. These matters will be dealt with when the appeal proper is heard and there is no need for us to say any more about that now. I

Shortly after the company's solicitors filed the application to us for a stay, they served an office copy of the application on the petitioner's

A solicitors. This was followed up with service of a sealed copy when that become available. All the special reasons required to support an application for stay are contained in the supporting affidavit. These papers were also served on the provisional liquidators.

But before us on the day of hearing, the provisional liquidators were B absent. The petitioner had not filed any affidavit in opposition to the application either. Instead, his counsel decided to stake his entire resistance on one point taken by way of a preliminary objection.

This was that the directors of the company ceased to have any capacity to instruct solicitors to make this application once the provisional C liquidators were appointed. Therefore, it was submitted that the application was not properly filed before the court and should be dismissed. Mr Liow Si Khoon, counsel for the petitioner, submitted that although the company could appeal against the order dated 8 June 1995, it could not apply for a stay because the provisional liquidators had taken over. He would not concede that the greater must include the less.

D His submission was grounded in s 226(3) of the Act. It reads:

> 226 (3) When a winding up order has been made or *a provisional liquidator has been appointed,* no action or proceeding shall be proceeded with or commenced against the company except —
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> (a) by leave of the Court; and
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> E (b) in accordance with such terms as the Court imposes.
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> (Emphasis added.)

With respect, this section only applies to proceedings *against* the company. Here, it was the company itself which was making the application. Mr Liow F relied very heavily on *Yamamori (Hong Kong) Ltd v Borneo Hotel Sdn Bhd & Anor* [1991] 3 CLJ 2238 and especially the passages at pp 2242–2243 which reads:

> Mr Davidson, for the first defendant, associated himself with the remarks and arguments of Mr Abraham but added that the real issue was whether the directors had any powers to instruct counsel. Such should be treated G under agency law and the internal management of the company which matters should be governed by Hong Kong laws. This being so, Mr Davidson was of the opinion that the powers of the plaintiff had ceased and that the provisional liquidator had withdrawn the authority of the solicitors. Mr Davidson informed the court that Bradley's affidavit at para 5 was founded on the judgment in *Re Union Accident Insurance Co Ltd* [1972] 1 All ER H 1105 at p 1113.

In this case, the directors in question were not appealing in the name of the company against a winding-up order or against the appointment of the provisional liquidator. This distinction is crucial if one is to understand the limitations of this authority. What the solicitors in Sabah were doing on I the instructions of the directors of Yamamori was to issue a writ in the name of Yamamori for a declaration that certain charges it created in favour of the Borneo Hotel Sdn Bhd were invalid. It is important to bear in mind that *after* the proceedings had been filed, the provisional liquidator

had been appointed in Hong Kong over Yamamori. The provisional liquidator refused to support the Sabah solicitors for costs. Mr Bradley, a Hong Kong solicitor, filed a deposition in these terms:

> The authority of the directors of the company would, under Hong Kong law, be terminated. It would follow that under Hong Kong law, the authority of the company's directors to deal with assets of the company abroad and to exercise any authority on behalf of the company abroad would be terminated.

The difference in our case is that the company itself is appealing against the order appointing the provisional liquidators. We agree with Mr Gan Teik Chee of counsel for the company that the better authority is *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1991] 3 MLJ 325 by which we are bound. At p 326, Hashim Yeop A Sani CJ (Malaya) said:

> In *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105, it was held, inter alia, that notwithstanding the appointment of the *provisional liquidator* and the general assumption by him of the company's powers, *the board still retained certain residuary powers which included authority to instruct solicitors and counsel to oppose the petition* and, if a winding-up order is made, *to appeal against the order*. In that case, it was also held that the power to instruct solicitors and counsel is not the power which any one could suggest has passed to the provisional liquidator. At p 1113, Plowman J said:
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> > 'The issue is to the extent of those residuary powers, and in particular whether they extend to the launching of the present motion. I think that it may sometimes be helpful to test the matter by considering the other side of the coin, namely to enquire whether the power which the board is said to have lost is one which can be said to have been assumed by the liquidator. If the answer is that it cannot, that may be a good reason for saying that the board still retains it. Clearly, for example, as I have already indicated, the power to instruct solicitors and counsel on the hearing of the winding-up petition is not a power which anyone could suggest has passed to the provisional liquidator and therefore the board retains it. If that is true in regard to the petition itself, it is, in my judgment, equally true of interlocutory proceedings which are such that it *would not be appropriate* for the *provisional liquidator* to give *instructions* on behalf of the company.'
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> Plowman J's decision found support in the Supreme Court of Victoria, Australia (where our Companies Act 1965 came from) in *Brinds Ltd & Ors v Offshore Oil NL & Ors* (1985) 10 ACLR 242 where, in the judgment of that court, the following passage appears:
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> > 'During the argument, I raised the question whether the applicant, Brinds Ltd, having been in liquidation since December 1983 and throughout apparently insolvent, had any locus standi to make, itself, this application for a stay, as distinct from on the one hand, such an application made by or with the consent of the liquidator and, on the other hand, a different application by others under s 383 of the Code.
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> > Since then, the researches of Nicholson J have discovered that ingenious counsel in 1879 raised the question and put the negative answer to the Court of Appeal in England in *Re Diamond Fuel Co* (1879) 13 Ch D 400 — see especially pp 404–405. Nearly 100 years later, in *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105 at pp 1112–1113, Plowman J suggested what I think are substantial reasons

A for an *affirmative answer* and, in any event, I think this court should proceed on the footing that the directors of Brinds Ltd have power to bring the present application in the name of the company. See also *McPherson Company law* (2nd Ed) at p 394 et seq.'

Re Diamond Fuel Co (1879) 13 Ch D 400 is also authority for the proposition that, despite the fact a liquidator had been appointed, a *residual power of* B *appeal remains* vested in the directors.

After a winding-up order is made, generally speaking, no one but the liquidator can act on behalf of the company. But it is quite clear that the company has a right to be heard to say that the winding-up order is wrong and to appeal against the order. In our case, it is expressly provided in *s 253(2) of the Act.* The only question is who should move the appeal on C behalf of the company. (Emphasis added.)

In the present case, the winding-up order had not yet been made and there is a short passage in *Australian Company Law* para 372/11 which reads:

All the powers of the directors shall cease

D A reference to the powers of directors was made in *Re Standhill Consolidated Ltd* [1967] VR 749 at pp 753–754. An issue as to the extent of any residuary powers in directors after the appointment of a liquidator arose in *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105; [1972] 1 WLR 640 where at pp 1113 and 642 respectively, Plowman J said: 'It is of course well-settled that on a winding up, the board of directors of a company becomes functus E officio and its powers are assumed by the liquidator, and my attention was drawn to *Re Mawcon Ltd* [1969] 1 All ER 188 at p 192; [1969] 1 WLR 78 at p 82, where Pennycuick J stated in effect that the appointment of a provisional liquidator had the same result. No doubt that is so, but it is common ground that notwithstanding the appointment of a provisional liquidator, the board has some residuary powers, for example, it can F unquestionably instruct solicitors and counsel to oppose the current petition and, if a winding-up order is made, to appeal against that order.'

Notwithstanding appointment of a provisional liquidator, the directors retained power to have the company represented in the winding-up proceedings: *Re Laverton Nickel NL* (1979) 3 ACLR 945.

G In the face of such authorities, we considered the preliminary objection devoid of merit and dismissed it with costs. Mr Liow then applied for an adjournment to file an affidavit to argue on whether there were special reasons. We refused this application because it had come too late in the day. So we came to the substantive application on which Mr Liow had nothing to say since he had provided no factual basis for any opposition. H We therefore allowed the amended application of the company with costs to be taxed and paid by the petitioner to the company.

Abu Mansor JCA: I have had the opportunity of reading the draft judgment of my brother, Mahadev Shankar JCA in this matter with which I I concur.

Application allowed.

Reported by Azra Azman-Parry